

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

GRADY JACKSON and KELLEY
ALEXANDER, in their representative capacity
pursuant to Cal. Bus. & Prof. Code §§ 17203,
17535 and Cal. Code Civ. Proc. §§ 382, 1021.5,

Plaintiffs,

v.

BALANCED HEALTH PRODUCTS, INC., a
Delaware Corporation, NIKKI HASKELL, an
individual, GENERAL NUTRITION
CORPORATION, a Pennsylvania Corporation,
and VITAMIN SHOPPE INDUSTRIES, INC., a
New York Corporation, inclusive,

Defendants.

CASE NO. C 08-05584-CW

**JOINT APPLICATION TO AMEND
ORDER SETTING FURTHER
SETTLEMENT CONFERENCE TO
ALLOW TELEPHONE APPEARANCES;
[PROPOSED] ORDER**

Date: August 26, 2009
Time: 9:30 a.m.
Judge: Hon. Joseph C. Spero
Location: Courtroom A

Plaintiffs Grady Jackson and Kelley Alexander ("Plaintiffs") and Defendants Nikki Haskell, Balanced Health Products, Inc. ("BHP"), General Nutrition Corporation ("GNC"), and Vitamin Shoppe Industries Inc. ("Vitamin Shoppe") (collectively, the "Parties") hereby jointly apply to the Court for leave to amend the Notice and Order Setting Further Settlement Conference dated July 14, 2009, to allow certain appearances at the August 26 Settlement Conference by telephone and to continue the deadline for submitting updated Settlement Conference Statements by one week to August 19.

On April 1 and 2, the Parties participated in a Settlement Conference for which they submitted Settlement Conference Statements. The Parties have continued to exchange and discuss

1 proposals for resolving the case, but believe a second settlement conference may be required to
2 bridge the gaps. But in light of the October 30, 2009 deadline to complete non-expert class
3 certification discovery, the sooner a settlement conference can be held the more likely it is to
4 succeed. The earliest the Parties can reconvene is August 26, but only if certain appearances are by
5 phone.

6 David Gernsbacher, counsel for Defendants Haskell and BHP, expects to be engaged in trial
7 in another case beginning the week of August 10, 2009, through the end of the week of August 21st.
8 Accordingly, the earliest available date for a settlement conference would be during the week of
9 August 24th. The parties are concerned that delaying the settlement conference beyond the week of
10 August 24th would undermine the likelihood of settlement, in light of the need for the Parties to
11 commence non-expert class certification discovery.

12 Mr. Gernsbacher can appear at a settlement conference on August 26th by telephone, but an
13 unavoidable, out-of-town obligation related to a family illness will prevent him from attending a
14 settlement conference in person that week or on any date before September 10, when Ms. Haskell's
15 motion to dismiss the Second Amended Complaint is scheduled to be heard. The Parties agree that
16 having Mr. Gernsbacher appear at a settlement conference on August 26th by telephone is more
17 likely to result in settlement than delaying the conference to a later date on which he might be able to
18 attend in person and therefore respectfully apply to the Court for approval for Mr. Gernsbacher to
19 appear telephonically.

20 In addition, Plaintiff Jackson will start training camp with the Detroit Lions in Allen Park,
21 Michigan, on July 1 and will be unable to travel to San Francisco in August. All of the other parties
22 or their authorized representatives would have to travel to attend the settlement conference –
23 Plaintiff Alexander and Defendants Haskell and BHP from Los Angeles, Defendant GNC from
24 Pennsylvania and Defendant Vitamin Shoppe from New Jersey – and the Parties would prefer to
25 avoid travel costs and instead put those resources toward a potential resolution. Mr. Gernsbacher is
26 also reluctant to have his clients appear in person without him. Each of the parties or party
27 representatives would, however, be available to attend the settlement conference on August 26th by
28 telephone.

1 For these reasons, the Parties believe that having these party representatives appear at a
2 settlement conference on August 26th by telephone is more likely to result in settlement than
3 delaying the conference to a later date, and respectfully request that the Court authorize the party
4 representatives as well as Mr. Gernsbacher to appear telephonically. Otherwise, the further
5 settlement conference currently scheduled for August 26 will have to be continued, but, in light of
6 the pending class certification and motion deadlines, it is not clear whether or when a continued
7 settlement conference could be convened before the further ADR session currently scheduled for
8 next February in the Case Management Order.

9 In the event that the Court declines to grant Mr. Gernsbacher or the party representatives
10 leave to appear at the August 26th settlement conference by telephone, the Parties respectfully
11 request that the August 26th settlement conference be removed from the Court's calendar, as the
12 agreement of Ms. Haskell and BHP to participate in an August 26th settlement conference was
13 expressly conditioned on Mr. Gernsbacher's ability to appear by telephone.

14 Finally, it is possible the Parties will continue to discuss the terms of a potential resolution
15 prior to the next settlement conference and believe it would be helpful to include a description of
16 those discussions in the updated settlement conference statements to be submitted with the Court. In
17 light of summer vacation schedules and other case schedules, it would be helpful in this regard if the
18 deadline for submitting the updated settlement conference statements could be moved back one
19 week, from August 12 (or two weeks before the next settlement conference) to August 19. The
20 Parties believe this would not unduly burden the Court since Settlement Conference Statements were
21 submitted prior to the April 1-2 Settlement Conference and the Court is aware of the primary issues
22 in the case and with respect to settlement.

23 Accordingly, it is HEREBY STIPULATED AND AGREED by and between the Parties,
24 through their respective counsel, as follows:

25 1. In light of the October 30, 2009, deadline to complete non-expert class certification
26 discovery in this case, a settlement conference should be held as soon as possible in order for
27 settlement conference discussions to be meaningful and for the Parties to have a reasonably good
28 chance of settling the case through the conference;

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2. Having Mr. Gernsbacher and the party representatives appear at a settlement conference on August 26th by telephone is more likely to result in settlement than delaying the conference to a later date;

3. Because the Parties may not agree to a settlement conference after the week of August 24th, proceeding with the August 26th settlement conference with telephone appearances by Mr. Gernsbacher and the party representatives is in the interest of justice and necessary to avoid the waste of judicial resources; and

4. To provide the Parties additional time to discuss potential terms of a resolution prior to submitting the updated confidential settlement conference statements, it would be helpful to move the deadline for submitting those updates from August 12 to August 19, 2009.

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CORPORATION and GENERAL
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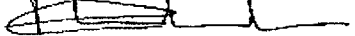
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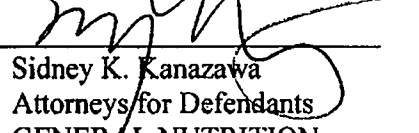
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1 Having reviewed the Parties' joint application and stipulation and good cause shown, the
2 Court hereby GRANTS the Parties' request to amend the Notice and Order Setting Further
3 Settlement Conference to authorize the party representatives and David Gernsbacher, counsel for
4 Defendants Balanced Health Products, Inc and Nikki Haskell, to appear at the August 26th
5 settlement conference by telephone.

6
7
8 Dated: 7/31/09

9
10 The Honorable
11 United States District Judge

